

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
BellSouth Telecommunications, Inc.)	
)	
Request for Declaratory Ruling That)	WC Docket No. 03-251
State Commissions May Not Regulate)	
Broadband Internet Access Services by)	
Requiring BellSouth to Provide Wholesale)	
or Retail Broadband Services to)	
CLEC UNE Voice Customers)	

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

I. INTRODUCTION AND SUMMARY

In their earlier filings in this proceeding, BellSouth, SBC and others showed that certain overzealous state commissions have begun unlawfully regulating BellSouth's Digital Subscriber Line (DSL) service.¹ Because these states have no authority over the interstate services they purport to regulate, we urged the Commission to preempt such state regulation.

The competitive local exchange carriers who are benefiting from these *ultra vires* actions by the states have claimed, however, that these state commissions have not imposed requirements that are in any way inconsistent with this Commission's regulation of DSL service and, therefore, there is no reason for this Commission to preempt those state decisions.² That is

¹ BellSouth Telecommunications, Inc. Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers, WC Docket No. 03-251 (Dec. 9, 2003) (BellSouth Petition); Comments of SBC Communications, Inc., WC Docket No. 03-251 (Jan. 30, 2004) (SBC Comments). *See also* Comments of Verizon, WC Docket No. 03-251 (Jan. 30, 2004) (Verizon Comments); Comments of Catena Networks, Inc., WC Docket No. 03-251 (Jan. 30, 2004); Comments of the United States Telecommunications Association, WC Docket No. 03-251 (Jan. 30, 2004).

² *See, e.g.*, Comments of AT&T Corp. and the CompTel/Ascent Alliance, WC Docket No. 03-251 (Jan. 30, 2004); Comments of Florida Digital Network, Inc., WC Docket No. 03-251 (Jan. 30, 2004); Comments of the Louisiana Public Service Commission, WC Docket No. 03-251 (Jan. 30, 2004); Comments of MCI, WC Docket No. 03-251 (Jan. 30, 2004).

simply incorrect. As discussed below, these state commissions are forcing BellSouth to enter into “line splitting” arrangements with a competitive local exchange carrier (CLEC), whereby BellSouth is required to provide DSL service to the CLEC’s unbundled network element (UNE) voice customers.³ Forced line splitting, however, is a requirement that this Commission has repeatedly rejected. Any attempt by a state commission to impose such a forced line splitting requirement on BellSouth, or any other incumbent local exchange carrier (ILEC), is inconsistent with -- and directly frustrates -- federal policy and must be immediately preempted by this Commission.

II. DISCUSSION

A. State Commission Decisions Requiring ILECs to Provide CLEC UNE Voice Customers with DSL Service Through Forced Line Splitting Arrangements Are in Direct Conflict with Numerous FCC Decisions and Must Be Preempted.

As described in BellSouth’s petition, the state decisions at issue require that, where a CLEC takes a voice customer from an ILEC and serves that customer over a UNE loop (or UNE-P) leased from the ILEC, the ILEC must: (1) provide retail DSL Internet access to that customer over the UNE loop leased by the CLEC; and/or (2) provide wholesale DSL transport to that customer or to a third-party provider of retail DSL service who wishes to serve that customer over the UNE loop leased by the CLEC.⁴ Thus, these state decisions are requiring the ILEC, through line splitting, to provide DSL service to the CLEC’s voice customer over the CLEC’s leased loop.

As discussed below, however, this Commission has addressed the issue of forced line splitting on numerous occasions and has consistently held that, while a CLEC may enter into a voluntary arrangement with a third-party DSL provider to offer DSL service to its UNE voice

³ As explained below, line splitting is the process by which a voice CLEC leases a UNE xDSL-capable loop from an ILEC and then partners with a data CLEC to provide voice and xDSL services to the voice CLEC’s customers.

⁴ BellSouth Petition at 5-10 (describing decisions by the state commissions from Florida, Louisiana, Kentucky and Georgia).

customers, “the incumbent LEC has *no obligation* to provide DSL over the competitive LEC’s leased facilities.”⁵ Any attempt by a state commission to impose such an obligation, which the Commission has already expressly rejected, is in direct conflict with, and frustrates, federal law and must therefore be preempted. Accordingly, the Commission should immediately grant BellSouth’s petition and preempt these unlawful state decisions.⁶

1. The FCC Has Repeatedly Rejected CLEC Attempts to Require ILECs to Engage in Forced Line Splitting Arrangements.

The Commission first coined the term “line splitting” in the *Texas 271 Order*, in which it described line splitting as the process where one or more CLECs provides both voice and DSL over a single UNE loop (or UNE-P) leased from the ILEC.⁷ By “splitting” the loop into a low-frequency portion for voice transmission and a high-frequency portion for DSL transmission, the

⁵ See *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, CC Docket No. 02-35, Memorandum Opinion and Order, 17 FCC Rcd 9018, 9100-01 (2002) (*Georgia-Louisiana 271 Order*) (emphasis added). See also *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Third Report and Order on Reconsideration in CC Docket No. 98-147, 16 FCC Rcd 2101, 2109-14 (2001) (*Line Sharing Reconsideration Order*); *Application by SBC Communications, Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18517-18 (2000) (*Texas 271 Order*); *Application by SBC Communications Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services, Inc., for Authorization to provide In-Region, InterLATA Services in California*, WC Docket No 02-306, Memorandum Opinion and Order, 17 FCC Rcd 25650, 25724 (2002) (*California 271 Order*).

⁶ In addition to creating a forced line splitting requirement, the state decisions also have the practical effect of imposing a new obligation on BellSouth to unbundle the low-frequency portion of the loop so that a CLEC can provide voice service to a BellSouth DSL service customer. See BellSouth Petition at 12-16; Verizon Comments at 6-8. But this is merely a back-door attempt to create an unbundling requirement that this Commission expressly rejected in the *Triennial Review Order*:

We conclude that unbundling the low frequency portion of the loop is not necessary to address the impairment faced by requesting carriers because we continue (through our line splitting rules) to permit a narrowband service-only competitive LEC to take full advantage of an unbundled loop’s capabilities by partnering with a second competitive LEC that will offer xDSL service.

Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17141 (2003) (*Triennial Review Order*). To prevent state commissions from undermining the *Triennial Review Order*’s unbundling limitations and eroding this Commission’s authority to craft a federal regime for unbundled access, the Commission should preempt these unlawful state decisions.

⁷ *Texas 271 Order*, 15 FCC Rcd at 18517-18.

CLEC is able to provide both services without the need to obtain a second loop.⁸ To provision the DSL service over the UNE loop, the CLEC may partner with a third-party DSL provider.⁹

Although ILECs are required to facilitate a CLEC's ability to engage in line splitting with a third-party DSL provider, ILECs have absolutely no obligation *to become* that third-party DSL provider.¹⁰ Indeed, in its first rulemaking proceeding addressing the scope of ILEC line splitting responsibilities, the Commission rejected a request by AT&T to impose just such an obligation: "We deny, however, AT&T's request that the Commission clarify that incumbent LECs must continue to provide xDSL services in the event customers choose to obtain voice service from a competing carrier on the same line. . . . [Commission precedent] does not require that they provide xDSL service when they are no longer the voice provider."¹¹

Despite the Commission's unambiguous rejection of AT&T's request, AT&T and other CLECs again raised this very same issue in the context of BellSouth's 271 application for Georgia and Louisiana.¹² And again, the Commission flatly rejected AT&T's argument: "We reject these claims because, under our rules, the incumbent LEC has no obligation to provide DSL service over the competitive LEC's leased facilities."¹³

In the recent *Triennial Review Order*, the Commission further clarified ILEC line splitting obligations.¹⁴ In that order, the Commission described line splitting as a process that

⁸ See *Line Sharing Reconsideration Order*, 16 FCC Rcd at 2110.

⁹ *Id.* See also 47 C.F.R. §51.319(a)(1)(ii).

¹⁰ *Line Sharing Reconsideration Order*, 16 FCC Rcd at 2110-11, 2114.

¹¹ *Id.* at 2109-10.

¹² *Georgia-Louisiana 271 Order*, 17 FCC Rcd at 9100 n.561.

¹³ *Id.* at 9100-01. See also *Texas 271 Order*, 15 FCC Rcd at 18517-18 ("Under our rules, the incumbent LEC has no obligation to provide xDSL service over this UNE-P carrier loop."); *California 271 Order*, 17 FCC Rcd at 25724 ("We reject this claim because, under our rules, the incumbent LEC has no obligation to provide DSL over the competitive LEC's leased facilities.").

¹⁴ *Triennial Review Order*, 18 FCC Rcd 16978.

occurs between two *CLECs*¹⁵ and adopted rules that define line splitting as “the process in which one competitive LEC provides narrowband voice service over the low frequency portion of a copper loop and *a second competitive LEC* provides digital subscriber line service over the high frequency portion of that same loop.”¹⁶ These rules further describe an ILEC’s line splitting obligations as providing a CLEC “with the ability to engage in line splitting arrangements with *another competitive LEC . . .*”¹⁷

Nowhere do the Commission’s rules, or any Commission order, even remotely suggest that an ILEC must enter into a line splitting arrangement to serve a CLEC customer. To the contrary, based on the Commission’s clear statements limiting an ILEC’s line splitting duties, there can be no doubt that an ILEC has absolutely no obligation whatsoever to provide DSL service to a CLEC’s voice customers over a UNE loop (or UNE-P) leased by that CLEC.¹⁸

2. State Decisions Requiring Forced Line Splitting are in Direct Conflict with Federal Law and Must Be Preempted.

Despite the Commission’s unequivocal rejection of a forced line splitting obligation, several state commissions have nonetheless imposed this very same obligation on BellSouth. The Louisiana Commission, for example, has ordered BellSouth “to continue to provide its wholesale and retail DSL service to customers who choose to switch voice services to a competitive local exchange carrier utilizing the Unbundled Network Element Platform.”¹⁹ Similarly, the Florida Commission has required that “BellSouth shall continue to provide its

¹⁵ *Triennial Review Order*, 18 FCC Rcd at 17131.

¹⁶ 47 C.F.R. § 51.319 (a)(1)(ii) (emphasis added).

¹⁷ *Id.* (emphasis added).

¹⁸ Even if such an obligation existed – and it does not – it would not apply to SBC because SBC does not provide DSL service. Rather, SBC’s structurally separate CLEC affiliate, SBC Advanced Services, Inc. (ASI), provides DSL service. Because line splitting is a *voluntary* arrangement between two CLECs, ASI also cannot be forced to enter into a line splitting arrangement with another CLEC. *See* 47 C.F.R. §51.319(a)(1)(ii) (providing a CLEC “with the *ability to engage in* line splitting arrangements with another competitive LEC”) (emphasis added).

¹⁹ *BellSouth’s Provision of ADSL Service to end-users over CLEC loops- Pursuant to the Commission’s directive in Order U-22252-B*, Docket No. R-26173, Clarification Order No. R-26173-A at 16 (La. Pub. Serv. Comm’n April 4, 2003) (*Louisiana PSC Order*).

FastAccess [DSL] Internet Service to end users who obtain voice service from [a CLEC] over UNE loops.”²⁰

These and other state commissions claim that they are not attempting to regulate DSL service, but rather they are addressing “anticompetitive”²¹ or “discriminatory”²² behavior in furtherance of their mission “to promote competition.”²³ What the state commissions fail to recognize is that this Commission has already found that an ILEC’s decision to decline a forced line sharing arrangement is *not* a discriminatory practice. In addressing claims that BellSouth’s decision not to offer DSL service to a CLEC’s voice customers over the CLEC’s UNE loop was somehow discriminatory,²⁴ the Commission pointed out that a UNE-based CLEC has the right to engage in line splitting on its loop and therefore the CLEC can use that loop to effectively compete with BellSouth’s combined voice and data offerings.²⁵ Accordingly, the Commission concluded that it “cannot agree with commenters that BellSouth’s policy is discriminatory.”²⁶ Any state commission decision suggesting that BellSouth’s conduct is discriminatory is therefore in direct conflict with this Commission’s conclusions that such conduct is *not* discriminatory.

²⁰ *Petition by Florida Digital Network, Inc. for Arbitration*, Docket No. 010098-TP, Order No. PCS-02-0765-FOF-TP at 11 (Fla. Pub. Serv. Comm’n June 5, 2002) (*Florida PSC Order*).

²¹ *Louisiana PSC Order* at 7; *Petition of MCI Metro Access Transmission Services, LLC and MCI Worldcom Communications, Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996*, Docket No. 11901-U, Order on Complaint at 19 (Ga. Pub. Serv. Comm’n Oct. 21, 2003) (*Georgia PSC Order*).

²² *Georgia PSC Order* at 6; *Petition of Cinergy Communications Company for Arbitrations of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to U.S.C. Section 252*, Case No. 2001-00432, Order at 2 (Ky Pub. Serv. Comm’n July 12, 2002).

²³ *Louisiana PSC Order* at 8; *Florida PSC Order* at 11.

²⁴ *Georgia-Louisiana 271 Order*, 17 FCC Rcd at 9100 n.561.

²⁵ *Id.* at 9100-01.

²⁶ *Id.* See also *Texas 271 Order*, 15 FCC Rcd at 18517-18 (“In sum, we do not find this conduct discriminatory.”); *California 271 Order* 17 FCC Rcd at 25724 (“Accordingly, we do not agree with XO that Pacific Bell’s policy is discriminatory.”).

History has shown the Commission to be prescient. After the Commission adopted the *Triennial Review Order* in February 2003, a host of CLECs, including AT&T and MCI, entered into a variety of line splitting arrangements with Covad to provide DSL service to consumers and businesses across the nation.²⁷ In this respect, state decisions that force BellSouth, or any other ILEC, to provide DSL service through line splitting arrangements not only conflict with -- but affirmatively frustrate -- this Commission's attempt to promote competitive entry by alternative DSL providers. Accordingly, this Commission should immediately preempt these unlawful state decisions.²⁸

²⁷ See *New Agreement With Covad Allows Z-Tel to Deliver Broadband Services to Its Telecom Customers*, Covad News Release, May 15, 2003 ("The combined powerful benefits of Covad's nationwide broadband network and Z-Tel's enhanced suite of voice services make for a highly compelling package . . ."); *Covad Provides DSL Service for AT&T's New High-Speed Internet Service Offer*, Covad News Release, July 30, 2003 ("Covad's DSL service is bundled with AT&T's local and long distance services offering customers the advantage of a single, convenient telecommunications package."); *Vartec and Excel Select Covad DSL for their Local/Long Distance Voice and Data Bundles*, Covad News Release, Aug. 28, 2003 ("Vartec and Excel will now be able to offer a voice and data bundle for several million of their customers nationwide."); *Covad Extends Partnership with MCI*, Covad News Release, Sept. 2, 2003 ("MCI will have access to Covad's nationwide network, which covers 1,800 central offices, serving more than 40 million homes and businesses in 96 of the top Metropolitan Statistical Areas (MSAs) in 35 states."); *Covad Partners with AT&T to Offer Bundled DSL and Voice Services in Four More States*, Covad News Release, Sept. 11, 2003 ("AT&T plans to offer Covad's DSL service in all states where AT&T provides bundled local and long distance residential services. AT&T now provides local phone service to more than 3.1 million customers in 13 states and expects to expand its footprint by testing or marketing its bundled local and long distance services in 35 states by year end. . . . A growing number of companies nationwide including AT&T, America Online, Earthlink, Sprint, Speakeasy, MCI, MegaPath and XO work with Covad to power their consumer and business broadband offerings."). See also *Covad Announces 2004 Network Expansion Initiative*, Covad News Release, Jan. 7, 2004 ("Covad . . . today announced plans to expand its nationwide coverage area and customer reach for digital subscriber line (DSL), frame access, and T1 broadband services. Covad will complete installing additional broadband equipment in approximately 200 central offices across the nation around the middle of 2004 increasing its nationwide broadband network to more than 2,000 central offices."). All of the preceding news releases may be found at <http://www.covad.com/companyinfo/pressroom/index.shtml> (last visited Feb. 20, 2004).

²⁸ See *Verizon Comments* at 5-6 (citing *City of New York v. FCC*, 486 U.S. 57, 64 (1988) ("The statutorily authorized regulations of a [federal] agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof.")).

III. CONCLUSION

For the forgoing reasons, the Commission should grant BellSouth's petition for declaratory ruling.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of February 2004, I caused copies of the foregoing Reply Comments of SBC Communications Inc. to be served on the parties on the attached service list by first-class mail.

/s/ Weyatta E. Wureh

Weyatta E. Wureh

February 20, 2004

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